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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON,
*Petitioners,*

v.

UNITED DOMINION INDUSTRIES, INC., PST, INC., and PRESSED STEEL TANK CO., INC.,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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### ARGUMENT

1. Respondents contend that this Court lacks jurisdiction over this case because the petition, although timely filed under this Court's rules, was filed after the Court of Appeals issued its mandate. This contention exemplifies the disingenuousness that characterizes respondents' Brief in Opposition ("Opp."). There is a long, unbroken line of decisions in this Court *rejecting* this very jurisdictional contention. *See Aetna Casualty & Sur. Co. v. Flowers*, 330 U.S. 464, 467 (1947) ("[n]or does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction"). *See also, e.g., United States v. Villamonte-Marquez*, 462 U.S. 579, 581

n.2 (1983); *Carr v. Zaja*, 283 U.S. 52, 53 (1931); Stern, Gressman & Shapiro, *Supreme Court Practice* 674 (6th ed. 1986). But respondents do not cite, much less do business with, these dispositive authorities.

2. Respondents' efforts to deny the existence of a conflict among the circuits is cut from the same type of cloth.

In the petition for certiorari, we demonstrated that the courts of appeals apply three different rules of interpretation in determining whether collectively bargained insurance benefits to which employees become entitled upon retirement are intended to be a permanent part of those employees' retirement packages or simply to remain a part of that package for the duration of the agreement under which the retirement occurs: (i) the rule adopted by the Seventh Circuit in the instant case (in the absence of a clear and express statement in the agreement that the retiree insurance benefits are intended to continue beyond the term of the contract, "entitlements established by collective bargaining agreements do not survive [the contract's] expiration or modification," Pet. App. 21a); (ii) the rule adopted by the Sixth and Fourth Circuits in *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), and *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989), respectively ("when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree," 716 F.2d at 1482);[1] and (iii) the rule followed by

[1] Contrary to respondents' representation, the Fourth Circuit in *Keffer* did not cite *Yard-Man* solely for the proposition that retiree benefits are a permissive, rather than a mandatory subject of bargaining. Opp. at 15. Instead, the court cited with approval the *Yard-Man* court's conclusion that "'it is unlikely that [retiree insurance] benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations.'" *Keffer*, *supra*, 872 F.2d at 64 (quoting *Yard-Man*, *supra*, 716 F.2d at 1482).

all the other circuits that have addressed the question (absent express contract language as to the duration of retiree insurance benefits, it is appropriate to consider extrinsic evidence in determining whether the benefits were intended to vest for the entirety of each retiring employee's retirement, *see* Petition at 14-17).

Respondents claim that we have "cobbled up" this conflict among the circuits (Opp. at 8); that there is no difference as to the rule of law applied by the various courts of appeals; and that any apparent differences in outcome are explained by variations in the language of the agreements involved in particular cases. Respondents contend that all of the circuits—including the court below—"follow the traditional method of contract analysis" (Opp. at 9), looking to extrinsic evidence only if the contract language is ambiguous.

But respondents skip over the inconvenience that the circuits take different legal positions as to *what is considered ambiguous contract language* in the context of determining the duration of retiree insurance benefits.

Thus, the court below squarely held that where a collective bargaining agreement provides retiree insurance benefits but does not expressly state that such benefits are "vested" or "for life," and the agreement contains a general termination clause, the agreement is *not* ambiguous with respect to the intended duration of such benefits and extrinsic evidence may *not* be admitted as an aid to interpretation of the agreement. Pet. App. 19a-21a. We cannot describe the holding any better than did the dissenters from the Seventh Circuit's denial of the motion for rehearing *en banc*:

> The panel's departure in the case before us is particularly striking where the contractual *language* is undeniably ambiguous and where the extrinsic evidence reveals that all the parties intended that the retirees' coverage was for life. The panel's so-called default rule prevents extrinsic evidence from *ever*

> being considered by ensuring that such agreements are always "unambiguous"; if they do not say "lifetime" or "vested," then benefits necessarily terminate with the contract's termination. Such a departure from settled principles of contract interpretation is unwarranted and presents an important issue for ERISA and labor law. Critical retiree benefits are being placed at risk. This problem has nationwide ramifications and deserves our *en banc* consideration. [Pet. App. 70a (emphasis in original).]

In contrast, the Sixth Circuit—as well as the Fourth Circuit—when faced with a contract that, as here, provides retiree insurance benefits and does not contain express language as to the duration of those benefits, draws the inference—rebuttable by extrinsic evidence—that lifetime benefits were intended. The remaining courts that have considered the question here—the First, Fifth, Eighth and Ninth Circuits—proceed on the understanding that such silence creates an ambiguity that justifies resort to extrinsic evidence.

Either of the latter two approaches would lead to a result different from the result reached below on the contract language in at least four of the five agreements at issue in this case.[2] And, as we pointed out in our peti-

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[2] Respondents attempt to create the false impression that the language of only two of the five collective bargaining agreements at issue—the 1984-1986 and 1986-1988 agreements—is relevant, because retirees under earlier agreements "transferred" into the benefit plan established under the later agreements. Opp. at 4. This is incorrect; each retiree's right to insurance benefits is established by the agreement under which he or she retired. If the operative agreement at the time of an employee's retirement provides for vested lifetime insurance benefits, the language of subsequent contracts does not affect that employee's entitlement to those benefits. The court below proceeded on this understanding of the agreements here and not on respondent's "transfer" theory; that court therefore examined the language of each of the five agreements and not only the 1984-1986 and 1986-1988 agreements. Pet. App. 2a-9a. The language of each of the five agreements is set forth in the Petition at 4-7.

tion, a number of cases in other circuits involving contract language that is analytically indistinguishable from the language here have been decided contrary to the ruling below. *See* Petition at 14, 16.

Indeed, if all the court below did was "follow the traditional method of contract analysis," Opp. at 9, it is difficult to understand why the Seventh Circuit would have *sua sponte* issued an order setting for *en banc* hearing the question "[w]hether *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992), should be overruled." *See* Petitioners' Supplemental Brief at 2 (quoting Order of Seventh Circuit in *Bidlack v. Wheelabrator*, No. 91-2378 (Aug. 3, 1992)).[3]

Accordingly, the petition is accurate in stating that there is a three-way conflict among the Circuits.[4]

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[3] The reality of this conflict has not been lost on the practicing bar. This fact is illustrated by recent litigation involving retiree health benefits in which an employer doing business in both the Sixth and Seventh Circuits filed a complaint in a district court in the Seventh Circuit seeking a declaration that its retirees were *not* entitled to lifetime insurance benefits, *Navistar Int. Corp., et al. v. Foster, et al.*, No. 92-C-4913 (N.D. Ill., July 28, 1992); the retirees moved to dismiss the Seventh Circuit action and promptly filed a complaint seeking a declaration that they *are* entitled to such benefits in a district court in the Sixth Circuit, *see Shy, et al. v. Navistar Int. Corp., et al.*, C-3-92-333 (S.D. Ohio, Sept. 14, 1992). As long as the current conflict goes unresolved, this type of forum shopping will routinely take place, and the outcome of retiree insurance cases will turn on where the action comes to decision.

[4] In addition to mischaracterizing the ruling in the instant case, respondents obscure the positions of other circuits, by citing to decisions where the language of the collective bargaining agreement —or unilateral employer plan—is unambiguous by any measure. There is no dispute that where the language of a collective bargaining agreement or plan is clear—either for or against the proposition that retiree insurance benefits endure for a lifetime—under any of the three rules of law described in the petition, extrinsic evidence is not admissable. *See United Steelworkers v. Connors Steel*, 855 F.2d 1499, 1501 (11th Cir. 1988) (the retiree

4. Respondents argue that this Court's decision in *Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215 (1991), buttresses the decision below, quoting the following passage:

> [A]n expired contract has by its terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. [*Id.* at 2225.]

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"'shall not have such coverage terminated or reduced . . . so long as the individual remains retired from the company . . . notwithstanding the expiration of this agreement'"), *cert. denied*, 489 U.S. 1096 (1989); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 611 (6th Cir. 1985) (company will provide benefits "'during the life of the pensioner'"), *cert. denied*, 475 U.S. 1017 (1986); *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 673 (6th Cir. 1985) ("[t]he Company shall pay the cost of all group insurance premiums . . . as long as such Employee remains retired and unemployed, either by the Company or by anyone else'"); *Howe v. Varity Corp.*, 896 F.2d 1107, 1108 (8th Cir. 1990) (plan's broad reservation of a right to "'amend or terminate'" allowed the employer (a company in receivership) to terminate benefits); *Pierce v. Security Trust Life Ins.*, 1992 WL 214042, 214047 (4th Cir. July 22, 1992) (*per curiam*) ("'[plan] reserves the right to change or terminate the Plan at any time'"); *Alday v. Container Corp.*, 906 F.2d 660, 662 (11th Cir. 1990) (plan administrators may "'terminate, suspend, withdraw, amend or modify the Plan in whole or in part at any time'"), *cert. denied*, 111 S. Ct. 675 (1991); *Musto v. American Gen. Corp.*, 861 F.2d 897, 903, 904 (6th Cir. 1988) ("'insurance coverage . . . may be amended or discontinued at any time, and the Company reserves the right to determine new premium contributions at any time'"; "'since it is not possible to foresee the future, the Company must reserve the right to change or even discontinue these provisions if it becomes necessary'"), *cert. denied*, 490 U.S. 1020 (1989).

Respondents' assertion that there is a conflict within the Sixth Circuit, Opp. at 17-18, is similarly based on its refusal to recognize that certain cases involve contract or plan language that would be considered clear or unambiguous under any of the three approaches taken by courts of appeals in retiree insurance cases, including courts of appeals employing the *Yard-Man* inference. *See Musto v. American General Corp.*, *supra*.

This passage acknowledges that an employer's obligation to provide benefits beyond the term of a contract may be "already fixed under the contract." The *Litton* Court, moreover, made it clear that such a contractual obligation may arise from "the express *or implied* terms of the expired agreement itself." 111 S. Ct. at 2224 (emphasis supplied) (citing *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243 (1977)). And, in determining what terms of the agreement may be implied—including the intended duration of contractual obligations—the *Litton* Court states that courts should utilize "normal principles of contract interpretation." 111 S. Ct. at 2225.

Under "normal principles of contract interpretation," courts interpreting a collective bargaining agreement read the language of the contract and, if it is subject to differing interpretations, examine extrinsic evidence as an aid to determining the intent of the parties. Thus, to the extent it can be said to address the issue here, the *Litton* Court's analysis cuts against the rule of contract interpretation adopted by the court below.

5. Finally, respondents argue that the Seventh Circuit's *en banc* resolution of *Bidlack v. Wheelabrator*, *supra*, will not alter the analysis, or the result reached, in the decison below, and that there is, thus, no reason to hold the petition here pending that *en banc* decision. Opp. at 25-26. This is a surprising line of argument in light of the express terms of the Seventh Circuit *sua sponte* order, requiring the parties in *Bidlack v. Wheelabrator* to brief the question "[w]hether *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir. 1992), should be overruled." *See* Petitioners' Supplemental Brief at 2 (quoting Order of the Seventh Circuit in *Bidlack v. Wheelabrator*, No. 91-2378 (Aug. 3, 1982)).

## CONCLUSION

For the foregoing reasons and the reasons set forth in the petition for certiorari, the petition for writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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